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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1977
No. 77-1273

BLANCHE HAWN, et al.,
Petitioners,

vs.

COUNTY OF VENTURA, CALIFORNIA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Petitioners, Blanche Hawn, et al., respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, and that upon review such decision be reversed.

Opinions Below

The opinion of the California Court of Appeal presented here for review is reported as Hawn v. County of Ventura (1977) 73 Cal.App.3d 1009, 141 Cal.Rptr. 111; the modification thereof (rendered upon denial of rehearing) appears at 74 Cal.App.3d 582a (the California Reporter has not, so far, published the modification).

A copy of the opinion as modified is attached hereto as an Appendix, with the modification appearing in italics.

Jurisdiction

The original opinion of the California Court of Appeal was filed on October 7, 1977. Thereafter, upon considering petitioners' timely petition for rehearing, that court extensively modified its opinion, and denied rehearing on October 27, 1977.

Petitioners' petition for hearing in the California Supreme Court was timely filed in that court which thereupon sua sponte extended its time in which to grant or deny hearing, and eventually

denied hearing on December 15, 1977.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented for Review.[1/]

1. Where a county ordinance provides that a county airport may not be located in whole or in part within the boundaries of an incorporated city within such county unless a majority of the voters of the city first approve such placement of the airport by referendum, does such ordinance deny equal protection of the laws to the populace of the county?

2. Where a county ordinance forbids outright the establishment or operation of county airports in county residential territory,[2/] does that deny equal protection to residents of incorporated cities?

1/ In reviewing Questions 1-3 it should be kept in mind that in California, counties are constitutionally able to regulate land uses only within their own unincorporated county territory, while incorporated cities can exercise like powers only within city territory.

2/ Specifically, airports whose runways are located within 1-1/2 miles of county land zoned for residential uses.

3. Where a county ordinance sets up a comprehensive county-wide airport land regulatory scheme, whereby county airports are forbidden outright in residential areas of the county, but may be established within limits of incorporated cities, provided that the majority of the voters of the particular city in which a county airport is sought to be established first approve it, does that:

(a) Deny equal protection of the laws to residents of the county because they cannot vote on the location of the airport, and simultaneously

(b) Deny equal protection of the laws to residents of the city because county residents are protected from having airports established in residential areas by outright prohibition, whereas city residents are free to vote to have an airport in their city?

4. (a) Do persons who are residents of a county but not of an incorporated city have standing to assert that a land use regulation ordinance purportedly denies equal protection, not to themselves,

but to residents of incorporated cities?

(b) Absent the presence in the litigation of any city resident, or any other litigant capable of raising the issue of invidious discrimination against city residents, may a court properly declare an ordinance unconstitutional on equal protection grounds as discriminating against city residents, particularly where such ground of unconstitutionality was neither raised nor briefed by the parties, but was asserted for the first time sua sponte by the Court of Appeal upon denial of petition for rehearing without reliance on any authority whatever?

Constitutional and Statutory Provisions

The following constitutional and statutory provisions are involved in this petition, and are reproduced in full in the Appendix attached hereto:

United States Constitution,
Fourteenth Amendment (Particularly the Equal Protection clause);
California Constitution,
Article XI, §7;

Ventura County Airport Initiative,
Ordinance No. 1

STATEMENT OF THE CASE

A. Procedural Background

This is an action brought by petitioners to enforce the provisions of Ventura County Airport Initiative, Ordinance No. 1 (hereafter referred to as "the ordinance"), after defendant Ventura County indicated that it would ignore the ordinance and establish a county airport in the City of Camarillo in violation thereof.[3/] Petitioners, as plaintiffs below, sought mandamus and declaratory relief against the county and its officials.

3/ An acute insight into the County's attitude that led to this litigation may be gained from the fact that when such ordinance was originally proposed in the form of an initiative, the County Clerk imperiously refused even to place it on the ballot, and had to be mandated by the state courts to do that constitutional duty. See Gayle v. Hamm (1972) 25 Cal. App.3d 250, 101 Cal.Rptr. 628.

On the eve of trial, intervenors contacted the trial judge at his home and requested leave to intervene. The following day, the trial judge disclosed this in open court, whereupon a stipulation was worked out to allow intervenors to file their complaint in intervention, provided that any of its material allegations would be deemed denied. The complaint alleged that intervenors were residents, voters and taxpayers of the county.

Thereafter, intervenors offered no evidence whatsoever in support of their complaint in intervention, confining themselves to arguments of their counsel, supporting the defendant county. It is thus clear, and not subject to dispute, that intervenors never established any nexus between their status and the supposedly unconstitutional effect of the ordinance upon themselves. Nonetheless, after the trial, the trial judge entered a minute order indicating that the intervenors' status as county residents was admitted.

After a trial primarily on stipulated facts, the trial court held the ordinance invalid on a number of grounds. Of these grounds only the purported constitutional invalidity on federal equal protection grounds is now in issue. This is so because none of such other grounds were relied on or even discussed by the Court of Appeal which expressly based its decision on federal equal protection grounds alone.

The Court of Appeal -- in a curious obversion of customary judicial treatment of constitutional issues -- declined to discuss or consider any non-constitutional grounds, and went directly to the federal constitutional issue which forms the sole basis of the decision below. The Court of Appeal declared Sections 1 and 2 of the ordinance to be unconstitutional on the asserted grounds that the "initiative voting scheme of the airport ordinance renders it constitutionally defective as to both sections 1 and 2 as a violation of equal protection of the laws . . ." (73 Cal.App.3d at 1022, 141 Cal.Rptr. at 118). The court below thus found the ordinance unconstitutional on

its face, considered "somewhat in a factual vacuum" (73 Cal.App.3d at 1017, 141 Cal.Rptr. at 115).

Since, however, Section 2 of the ordinance contains no voting provisions whatever -- "initiative"[4/] or otherwise -- petitioners pointed out in their petition for rehearing that Section 2 had been invalidated without any stated reason. In response -- and without affording the parties any opportunity to address the court on that issue -- the court below modified its opinion by adding a paragraph (reported at 74 Cal.App. 3d 582a) that sua sponte purported to find Section 2 unconstitutional as well, because (a) "Section 2 makes reference to section 1 as being an exception to section 2. Section 2, therefore, is so intertwined with section 1 that if section 1 falls, section 2 must fall also" (74 Cal.App.3d at 582a), and (b)

4/ In the interest of accuracy, it should be noted that the court below manifestly misspoke; neither section of the ordinance involves any "initiative". Section 1 provides for a referendum and Section 2 contains no voting provisions at all.

Section 2, said the court, invidiously discriminated against residents of cities by banning airports outright in residential county areas and not in city areas. The modification failed to give any indication of the court's awareness that counties lack capacity to regulate non-county land located in cities.

The California Supreme Court denied hearing.

B. Statement of Facts[5/]

In the late 1930s the Oxnard Air Force Base came into existence as a military training facility. The airport was deactivated following World War II, but its operation by the United States Air Force was resumed in 1950, Thereafter, the airport operated as the Oxnard Air Force Base until December 31,

5/ The following summary is based on the trial court's findings, which in turn rest upon a stipulation by the parties. Since the trial court held the ordinance invalid on its face, the issue raised on appeal was purely one of law; i.e., whether the ordinance on its face violates the Equal Protection clause.

1969, at which time it was deactivated and declared to be surplus United States property.

Since then, the county has attempted to acquire the facility to convert it to use as a county airport. The county has applied to the General Services Administration seeking to obtain fee title to the major portion of the facility, which is comprised of approximately 652 acres, including an 11,000 foot runway and 26 buildings containing approximately 330,000 square feet of space. The majority of the property lies within the incorporated limits of the City of Camarillo.

The last revised application indicates that the county intends to use the former base as a general aviation public airport. Commercial aircraft operations would be permitted under the county's application subject to an assessment of demand and environmental consequences.

During the pendency of the county's application for conveyance of the property, the United States government and the county entered into a lease, pursuant

to which the county has taken possession of those portions of the Oxnard Air Force Base which are the subject of its application for development and use.

Residents of the City of Camarillo were opposed to having an environment-disrupting commercial airport in their city for no better reason than that the former Air Force base just happened to be where it was. 6/ Since county officials were intent on converting the former Air Force base into a commercial airport irrespective of the needs and wishes of the population of Camarillo, there ensued a popular movement to enact legislation by initiative that would afford city residents a say in such matters and that would protect county residential areas from finding themselves receptacles for the disruptive byproducts of airport

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6/ It cannot be overemphasized that no planning or site selection whatever took place before the county's decision to place the new airport in the City of Camarillo. The choice was made simply because the abandoned Air Force airfield was there. Thus, the site choice within the City of Camarillo was wholly arbitrary.

operations (i.e., noise, traffic, air pollution, etc.). The upshot was that the voters of the entire county adopted the ordinance (a copy of which is appended hereto) banning airports outright in residentially zoned areas, but leaving an option for cities to have airports within their boundaries, when approved by a majority of city voters.

The Ventura County Board of Supervisors, in disregard of the ordinance, failed to take action to call an election of the residents of the City of Camarillo in respect to the establishment or operation of a county airport on the site of the former Oxnard Air Force Base, nor has the approval of the residents of the City of Camarillo with respect to said airport been obtained in any other manner. 7/

7/ The arrogantly anti-democratic conduct of the public officials in this controversy also finds recognition in the observation of the court below: "The record before us details the efforts made by certain Camarillo residents to attack the primary decision of airport site location in the face of the determination of local government officials to proceed,

(continued)

Within one and a half miles of the runway of the former base there exists, and has existed at all times relevant to this action, a substantial amount of unincorporated county land which is limited by applicable zoning ordinances to residential uses. The record gives no indication that the county made any attempt to rezone such land to airport compatible uses.

Ventura County has three general aviation airports: The Santa Paula Airport, the Santa Susana Airport, and the Ventura County/Oxnard Airport. These are largely used by small, private aircraft for business, training and recreational purposes. Various studies and forecasts have shown an increasing demand for commercial short-haul passenger service to other areas in the state, in addition to Los Angeles and Santa Barbara.

Other than the county's desired development of the former Oxnard Air

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7/ (continued)
regardless of the majority vote against their actions which was recorded in the 1974 elections" (73 Cal.App.3d at 1018, 114 Cal.Rptr. at 115).

Force Base, there are no present airport development programs in the county which are anticipated to meet the existing and future demands for expanded aviation facilities, commercial and general.

REASONS FOR GRANTING THE WRIT

I

THE HASTY HOLDING BELOW THAT A COUNTY LAND USE CONTROL ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO REGULATE THE USE OF LAND WITHIN CITIES OVER WHICH COUNTIES HAVE NO REGULATORY POWERS, INJECTS CHAOS INTO PERTINENT LAW AND DEFIES THIS COURT'S HOLDINGS.

The Ventura County ordinance which was stricken down below under the equal protection clause, contains two sections. Section 1 provides for a referendum by city voters before a county airport may be established within city limits, and is discussed elsewhere in this petition. Section 2, on the other hand, contains no voting provisions whatsoever, and simply bans outright the creation or maintenance of county airports in county residential areas. Thus, Section 2 is

in no way concerned with voting rights or any other fundamental rights that might even arguably call for application of the "strict scrutiny" standard of constitutional review; it is a plain, ordinary, garden-variety land use control ordinance that bans a particular kind of commercial land use incompatible with residential surroundings. That this is proper, is thoroughly settled (see e.g., Hadacheck v. Sebastian (1915) 239 U.S. 394, [ordinance banning brickworks in residential areas upheld]; Goldblatt v. Town of Hempstead (1962) 369 U.S. 590 [ordinance banning gravel pits in residential areas upheld]; Reinman v. Little Rock (1915) 237 U.S. 171 [ordinance banning livery stables in residential areas upheld]).

Thus, Section 2 of the ordinance in question is subject to constitutional review using the familiar "rationality test", under which it plainly passes muster. As attested to by much litigation[8/]

8/ See, e.g., Griggs v. Allegheny County (1962) 369 U.S. 84; City of Inglewood v. City of Los Angeles (9th Cir., 1972) (continued)

and literally reams of law review commentaries,[9/] airports located in densely populated urban residential areas wreak havoc on their surroundings, next to which the effects of a brick kiln or gravel pit pale into trifling insignificance. The rationale of Hadacheck, Goldblatt and Reinman is thus a fortiori applicable to the ordinance at bench, and the exclusion of airports from residential areas is manifestly proper.

8/ (continued) 451 F.2d 948; Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 496 P.2d 480, 101 Cal.Rptr. 568; Thornburg v. Port of Portland (1962) 233 Ore. 178, 376 P.2d 100; Aaron v. City of Los Angeles (1974) 40 Cal.App.3d 471, 115 Cal.Rptr. 162.

9/ By way of a small sampling only, see Berger, "Nobody Loves an Airport" (1970) 43 Southern California Law Review 631; Stoebuck, "Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect" (1967) 71 Dickinson Law Review 207; Spater, "Noise and the Law" (1953) 63 Michigan Law Review 1373; Hildebrand, "Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research" (1970) 70 Columbia Law Review 652; Comment, "Port Noise Complaint" (1970) 6 Harvard Civil Rights Law Review 61.

Moreover, the problem is exacerbated by the fact that once an airport is activated, it becomes uncontrollable either by the persons injured by its operations [10] or by the municipality in which it is located.[11] Thus, it becomes critically important to permit the airport-impacted community to make the choice of whether it does or does not want an airport in its midst before the airport is activated and assumes the sadly familiar posture of Frankenstein's monster generating a maelstrom of inverse condemantion lawsuits. See, Berger, "You Know I Can't Hear You When the Planes Are Flying", 4 The Urban Lawyer 1 - 3 (1972).

10/ Loma Portal Civil Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 395 P.2d 548, 39 Cal.Rptr. 708; San Diego Unified Port Dist. v. Superior Court (1977) 67 Cal.App.3d 361, 136 Cal.Rptr. 557, cert. den.

11/ Burbank v. Lockheed Air Terminal, Inc. (1973) 411 U.S. 624; American Airlines, Inc. v. Town of Hempstead (1967, E.D.N.Y.) 272 F. Supp. 226, aff'd. (1968, 2d. Cir.) 398 F.2d 269.

Recent decisions of this Court in Arlington County Board v. Richards (1977) ___ U.S. ___, 54 L.Ed.2d 4, 98 S.Ct. 24, and Village of Belle Terre v. Boraas (1974) 416 U.S. 1, leave precious little room for rational dispute on this point. This Court could hardly have been more explicit in endorsing the constitutional legitimacy of wholesome environmental community values, and the appropriateness of their protection by local ordinances.

Thus, Belle Terre and Arlington County -- as well as the more traditional decisions alluded to above -- provide clear authority for finding a legitimate state interest that justifies promotion by local governmental regulation that excludes noxious land uses in residential areas. The only limitation on such regulation is that it draw rational distinctions among the regulated classes. (Arlington County Board v. Richards, supra, ___ U.S. ___, 54 L.Ed.2d at 7, 98 S.Ct. at ___; New Orleans v. Dukes (1976) 427 U.S. 297, 303; Village of Belle Terre v. Boraas, supra, 416 U.S. at 9.

In that legal context, it appears incontestable that a county ordinance which bans airports in county residential areas plainly meets the above criteria, and neither does nor on its face can deny equal protection to residents of other political subdivisions over whose land the county has no control whatever. It comes dangerously close to bringing the provisions of the equal protection clause to a reductio ad absurdum posture to say that a perfectly legitimate county land use ordinance is invalid because it does not purport to govern other political subdivisions whose land is not subject to the county's control.[12/]

12/ While such division of land regulation authority between counties and cities follows as an axiomatic aspect of American law of local government, it should be noted that in California it is also a matter of state organic law. Under California Constitution Article XI, § 7, counties and cities may regulate land uses only within their respective territories. California's counties may not regulate land in cities (South San Francisco v. Berry (1953) 120 Cal.App.2d 252, 253 [1], 260 P.2d 1045) and vice versa (County of Los Angeles v. City of Los Angeles (1963) 212 Cal.App.2d 160, 28 Cal.Rptr. 32).

II

THERE IS NO ONE BEFORE THE COURT CAPABLE OF RAISING THE ARGUMENT THAT SECTION 2 OF THE ORDINANCE DISCRIMINATES AGAINST CITY DWELLERS

The aspect of the case at bench suggested by the above heading is both simple and crystal-clear. As noted above Section 2 of the ordinance was invalidated below because of its supposed invidious discrimination against city residents. But the only parties at bench who have attacked the constitutionality of the ordinance are the defendant County of Ventura and Intervenors K. D. Johnson, et al. (who are county residents). None has standing to espouse the cause of the supposedly invidiously discriminated-against city dwellers.[13/] (See Warth v. Seldin (1975) 422 U.S. 490, 498; Schlesinger v. Reservists to Stop the War (1974) 418 U.S. 208, 217-221.)

13/ It is basic that the county, a political subdivision, lacks standing altogether to assert any Fourteenth Amendment rights which apply only to persons. (See Risty v. Chicago R. I. & P. Ry. (1926) 270 U.S. 378, 390; Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179.)

In connection with Section 2 of the ordinance, neither the county nor the intervenors possess the requisite personal stake in the outcome of the instant controversy under Warth and Schlesinger. Also see Flast v. Cohen (1968) 392 U.S. 83, 101. Moreover, besides lacking standing on the basis of their status, neither the county nor the intervenors have alleged (much less proved) the requisite nexus between their nonexistent status (U.S. v. Richardson (1974) 418 U.S. 166) and ". . . the precise constitutional infringement alleged" (Flast v. Cohen, supra, 392 U.S. at 102).

In short, in evident disregard of this Court's teaching in Broadrick v. Oklahoma (1973) 413 U.S. 601, 610, the court below sua sponte assumed the proscribed role of a "roving commission" invalidating legislation not to its liking without regard for the ". . . necessity of adjudicating rights in particular cases between litigants . . .". There is simply no one before the Court with standing to assert that Section 2 of the ordinance invidiously discriminates against him.

III

BY ITS OVERBROAD INTERPRETATION OF THE ROLE OF VOTING IN LOCAL LAND USE CONTROL LAW, THE OPINION BELOW TRANSFORMS THE EQUAL PROTECTION CLAUSE INTO A SELF-STULTIFYING IMPEDIMENT TO RATIONAL GOVERNANCE.

The asserted equal protection weakness of the ordinance boils down to the charge that Section 1 is "voting legislation" reviewable by the "strict scrutiny" standard of constitutional review, and when so viewed it is deemed to discriminate invidiously against county residents. The discrimination, in turn, is said to spring from the inability of the county residents to protect themselves from the wicked city residents "dumping" the airport onto county residents by refusing to allow it within city limits [14/] (see 73 Cal.App.3d at 1020, 141 Cal.Rptr. at 117).

14/ It cannot go without emphatic note that if there is any "dumping" involved here, it is the residents of the City of Camarillo who are being "dumped" upon by having a county airport crammed down their throats. As this Court astutely noted in Burbank v. Lockheed Air (continued)

This melodramatic analysis of the problem, however, overlooks several vital factors:

1. As the court below itself correctly noted, the ordinance is actually "an attempt to regulate airport site selection . . ." (73 Cal.App.3d at 1020, 141 Cal. Rptr. at 117).

2. The court's colorful language notwithstanding, it is impossible to "dump" an airport onto county residents. The opinion below manifestly overlooked that Section 2 of the ordinance bans airports outright

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14/ (continued)
Terminal, supra, 411 U.S. at 635, fn. 14, ". . . many airports are owned by one municipality yet physically located in another". The political upshot of such arrangements is that the airport-impacted municipality is precluded from voting out the public officials of the entity that operates the extraterritorial airport without regard to the wellbeing of the surrounding community. See Berger, supra, 4 The Urban Lawyer at 12-13, and Berger, "Nobody Loves An Airport", 43 Southern California Law Review 631, 681-725 (1970). Such is also the situation in the case at bench; the county means to have its environment-corroding airport where its adverse effects will be primarily felt by city residents.

in county residential areas.15/

3. The referendum and initiative are by now manifestly proper tools of land use control regulation (see City of East Lake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668), and

4. Not every limitation on the exercise of voting rights is subject to a stringent standard of review (Bullock v. Carter (1972) 405 U.S. 142, 143).

15/ This makes that court's subsequent afterthought invalidation of Section 2 particularly ironic. Obviously, Sections 1 and 2 together form a rational balanced scheme that protects both city and county dwellers by excluding airports from county residential areas, but providing an option to city dwellers to forego this protection, if the city's population in a democratic fashion opts for accepting the environmental burdens of an airport for the sake of convenience of having ready access to air transportation serving urban centers, the place where most airport users reside. This scheme, moreover, was adopted by county voters.

Moreover, even if the strict scrutiny standard of review were called for, that would not mean that different treatment of voting segments of the population is constitutionally wanting. Thus, in United Jewish Organizations v. Carey (1977) ___ U.S. ___, 51 L.Ed.2d 229, 97 S.Ct. 996, this Court upheld a voter group classification calling for "strict scrutiny" on two grounds: it involved disparate treatment of voter groups and the disparity rested on the classically suspect grounds of race.

In other words, the court below erred by treating the invocation of the "strict scrutiny" test as if it were synonymous with invalidation of the statute under review. The point is probably best made by Town of Lockport v. Citizens for Community Action (1977) ___ U.S. ___, 51 L.Ed.2d 313, 97 S.Ct. 1047, involving a voting scheme which -- very much as the one at bench -- gave the population of cities the right to veto the adoption of countywide laws, notwithstanding that the vetoing voters constituted a minority of the voting public. In short, where a

voting scheme treats disparate voting segments differently, it is still a valid inquiry whether a valid governmental objective is being pursued through reasonable means.

At bench these criteria are met. The preservation of a wholesome environment in a community is surely a legitimate objective (Village of Belle Terre v. Boraas, supra; Arlington County Board v. Richards, supra), and such objective may be properly pursued by allowing community with a legitimate -- albeit local -- interest to cast a veto at the ballot box to protect that interest (Town of Lockport v. Citizens for Community Action, supra).

The opinion below simply disregards these vital considerations in pursuit of some sort of ill-defined, idealized, pea-in-the-pod notion of total equality which the equal protection clause was never meant to insure, and which makes for bad public policy.

IV

THE HOLDING BELOW THAT SECTIONS 1 AND 2 OF THE ORDINANCE ARE NON-SEVERABLE CONTRAVENES SETTLED LAW.

Although the court below erroneously held Section 2 of the ordinance unconstitutional under the equal protection clause, it also sought to buttress its decision by asserting that Section 2 was so "intertwined" with Section 1 as to render it non-severable (see 74 Cal.App. 3d at 582a).

To the extent reliance may be placed by respondents on this legally insubstantial ruling, petitioners would point out that the ordinance contains a broad and unequivocal severability clause (Section 5) which establishes legislative intent beyond the possibility of quibble.

Section 2 merely alludes to Section 1, by providing that except as provided in Section 1, airports are banned in county areas zoned for residential uses. Such an outright ban on incompatible land uses is plainly constitutional

(see pp. 16-20, supra), and even if the court below was of the view that the voting scheme of Section 1 was invalid (which it was not; see pp. 23-27, supra), there is nothing in Section 2 that is "intertwined" with Section 1. It is quite plain, both from the language of the ordinance and its legislative history apparent from the facts (see pp. 10-15, supra) that the legislative intent was indeed to enact the provisions of Section 2 (i.e., to ban airports from county residential areas) independently of the exception giving cities the option to vote for airports in their territorial limits. (See United States v. Jackson (1968) 390 U.S. 570, 585, and the language from Champlin Refining Co. v. Corporation Commission (1932) 262 U.S. 210, 234, quoted there).

Thus, this Court's well-settled line of authority is dispositive:

> "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have

> enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."
>
> Champlin Refining Co. v. Corporation Commission, supra, 262 U.S. at 234.

Where -- as here -- the legislature contains an express statement of legislative intent to preserve serverability, the intent is respected by the courts (Electric Bond & Share Co. v. Securities and Exch. Com'n. (1938) 303 U.S. 419, 434).

CONCLUSION

The opinion below is plainly erroneous, particularly with regard to its invalidation of Section 2 of the ordinance. The improvident and unsupported theory on which such invalidation rests, literally requires local governmental entities to perform a legal and political impossibility: they cannot ban noxious land uses in their own territory, unless they also somehow ban like noxious uses

in territory of other political jurisdictions, which they have no power to do. The net result more resembles Catch-22 than a rule of law.

Accordingly, petitioners pray that a writ of certiorari issue to correct the serious anomaly in prevailing constitutional law that the opinion below represents, and to prevent the serious mischief which its precedential application is certain to cause.

Indeed, this would seem to be an appropriate case for the invocation of this Court's power to grant certiorari and vacate the erroneous opinion below summarily.

Respectfully submitted,
GIDEON KANNER
EDWARD L. LASCHER
WENDY C. WILNER

Attorneys for Petitioners

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR

BLANCHE HAWN, et al., Plaintiffs and Appellants,	COURT OF APPEAL SECOND DIST. F I L E D
vs.	OCT 7 - 1977
COUNTY OF VENTURA, et al., Defendants and Respondents,	CLAY ROBBINS, JR. Clerk
K.D. JOHNSON, RALPH RICHARDSON, Intervenors and Respondents,	2 Civ. No. 48220 (Super. Ct. No. SP 47737)

APPEAL from a judgment of the Superior Court, Ventura County. Richard C. Heaton, Judge. Affirmed.

Edward L. Lascher and Gideon Kanner for Plaintiffs and Appellants.

Dorothy L. Schecter, County Counsel and R. Thomas Harris, Assistant County Counsel, for Defendants and Respondents.

Siple and Orrock and Randolph E. Siple, for Intervenors and Respondents.

Plaintiffs City of Camarillo, a municipal corporation, and Camarillo residents Hawn, Scott and Lund, sought a writ of mandate as well as injuctive and declaratory relief to enforce Ventura County Airport Initiative Ordinance No. 1 (sometimes referred to as Proposition A). Named as defendants were the County of Ventura, the Ventura County Board of Supervisors (Jones, Jewett, Grandsen, Flynn and Bennett), and certain Ventura County officials, Hamm, Lish and Volk. Shortly before trial, the trial court granted certain Ventura County residents the right to intervene in the suit; trial by the court proceeded pursuant to stipulated facts.

Findings of fact and conclusions of law were signed and filed by the trial court, awarding judgment to the defendants. The ordinance, which sought to place restrictions on the location of new airports in Ventura County, was declared unconstitutional. Plaintiffs

have appealed from the judgment.[1/]

I

Background Discussion

This is the second time that the dispute between certain residents of the City of Camarillo and Ventura County officials concerning county operation of the Oxnard Air Force Base as a county airport has been before this court.

For a number of years, Ventura County officials have desired to acquire the air force base from the federal government and to operate it; much of the base is located within the City of Camarillo, and some interested local citizens have sought to prevent such use. In 1971, proponents of an initiative designed to prohibit county operation of the airport attempted to place the initiative on the countywide ballot by filing a petition with the Ventura County Clerk. Acting upon advice from the county counsel that the proposed measure was invalid, the

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1/ By stipulation of the parties, plaintiff City of Camarillo abandoned its appeal and a judgment was entered ordering that the appeal be dismissed as to the City of Camarillo.

clerk refused to follow the procedure for examination of signatures, as set forth in Election Code section 3707, prior to placing the measure on the ballot. The proponents were successful in obtaining a writ of mandate directing the county clerk to proceed as required by law; the issuance of the writ, which was appealed, was affirmed by this court in Gayle v. Hamm (1972) 25 Cal.App. 3d 250. It was there held that initiative petitions, emanating as they do from the People, may not be disposed of in this way, despite doubts as th their ultimate validity. It was pointed out that "the reserved initiative power in the electorate (Cal. Const., art. IV, §§ 1 and 25) [is] an instance of 'fundamental democracy' as opposed to 'representative government' . . . ." (Gayle, supra, 25 Cal.App.3d 250, 257.)

Proponents of the County Airport Initiative Ordinance No. 1 then presented it to the voters at the November 4, 1974, election, and it was passed by a majority. In pertinent part, it reads as follows: "SECTION 1. [¶] (a). VOTERS SHALL HAVE THE RIGHT TO APPROVE AIRPORTS LOCATED

WITHIN CITY LIMITS. Prior to the establishing, owning, operating, leasing or maintaining of any airport by the County of Ventura located in whole or in part within any incorporated city in the County of Ventura, approval of the majority of voters voting at any election on such issue of any such city shall first be obtained. [¶] (b) EFFECT ON EXISTING AIRPORTS. This Section shall not prohibit the County of Ventura from maintaining and operating any airport which was regularly and actively being operated by any governmental entity or agency as an airport on a day to day basis with flight operations as of December 1, 1972; provided, however, such excepted airport shall not have any runways added, nor shall any of the runways of such excepted airport be extended, widened, lengthened, strengthened nor capped unless the question of such addition, extension, widening, lengthening, strengthening or capping of such runway or runways has been submitted to the voters of the city in which such airport is located and a majority of those voting on such question have voted in

favor thereof. Maintenance and repair of existing runways that would not expand the then existing levels of service provided by said runways may be performed without such a vote. [¶] SECTION 2. ZONING RESTRICTIONS AROUND AIRPORTS NOT LOCATED IN CITIES. Except as may be permitted pursuant to the provisions of Section 1 of this ordinance, the County of Ventura shall not establish, own, lease, operate nor maintain any airport located in unincorporated territory, if any portion of any runway of such airport is within one and one-half (1 1/2) miles of any property limited by the applicable zoning ordinance for such property to residential uses."

Also included in the ordinance is a definition of what constitutes an airport within the meaning of the ordinance's provisions, delineation of the agencies and entities affected, and a severability clause seeking to retain the viability of the balance of the ordinance should certain portions thereof be determined to be invalid or unconstitutional.

Despite its passage, Ventura County officials proceeded with their plan to activate Oxnard Air Force Base as a county airport. When it appeared that negotiations between Ventura County and the federal government were approaching fruition, plaintiffs, on July 28, 1975, filed the present petition for mandate to prevent the airport operation. As we have indicated, plaintiffs were unsuccessful in obtaining relief in the trial court.

II

The Findings of Fact

We summarize the pertinent findings of fact. The Oxnard Air Force Base has been in existence since the 1930's as a training facility for the federal armed services. In 1945, after World War II, it was deactivated and turned over to Ventura County and operated as an airport. In 1950, the United States Air Foce again took possession of the premises, pursuant to the National Emergency Act and as a result of the Korean War. The base was then used for military purposes until

December 31, 1969, at which time it was declared surplus United States property. Since that time, Ventura County has evidenced an interest in acquisition.

On May 15, 1973, Ventura County applied to the United States General Services Administration, in an effort to secure the air base. There have been subsequent revisions of the application and, at the time this matter was before the trial court, the application was still pending. In the application, Ventura County sought fee simple title to a major portion of the base facility of 652 acres, including a runway of 11,000 feet in length and 26 buildings containing 330,000 square feet of space.

The application contemplated "general aviation" operations at the base, defined as "all non-air carrier operations." However, assuming favorable resolution of environmental impact considerations, the airport would also eventually provide commercial aircraft facilities. Other portions of the base would be leased by the County to various supportive enterprises. No consideration was to be paid

by the County for this acquisition. During the pendency of the application, Ventura County and the federal government entered into a lease agreement to facilitate Ventura County's temporary operation of the airport; the lease became effective August 28, 1975, and is to continue until disposition of the leased premises is made by the General Services Administration or five years have elapsed, whichever occurs first.

A substantial majority of the airport acreage lies within the incorporated limits of the City of Camarillo. However, there are portions of the airport located in unincorporated territory, within 1 and 1/2 miles of residentially-zoned property. Thus, if the ordinance is valid, the establishment of the base as a county airport would be prohibited unless and until a majority of voters in Camarillo approved it (Section 1); and those portions of the base lying in unincorporated territory could not be used as airport facilities unless and until appropriate rezoning was undertaken (Section 2). However, under the ordinance,

the voters in the unincorporated areas in Ventura County are not given an opportunity, as city voters are, to approve or reject the location of an airport on unincorporated land.

The findings also tell us that, in addition to the Oxnard Air Force Base proposed airport, there are three other airports within the County of Ventura. Santa Paula and Santa Susana Airports are small, private airports. The third -- Ventura County-Oxnard Airport -- is widely used, offering service to many small private aircraft and, also, offering a limited amount of scheduled commuter passenger service to Los Angeles and Santa Barbara. Cargo and freight facilities at all existing airports are very limited, and, according to the findings, there have been studies showing that there is a substantial and increasing need for commercial short-haul passenger service -- a service which is not presently being met. The existing aircraft facilities, it is estimated, will be filled to capacity in five years; long-range forecasting is that in excess of 1,000 aircraft will be

needed within ten years, while present capacity is less than 800 aircraft. There is reference in the findings to an erstwhile plan of the Ventura County Board of Supervisors to locate a new airport at Tierra Rejada, in the eastern end of the County, but the passage of the airport initiative and other problems intervened.

The trial court found that, other than the Oxnard Air Force Base, there are no airport development programs in existence to meet the existing and future demands for airport service in Ventura County; that the Ventura County-Oxnard site cannot be expanded, due to proximity to residential areas and high costs. Thus, it was determiend that the Oxnard Air Force Base represents the "only present, feasible alternative" to meet airport requirements in the County of Ventura. "Reasons include the low development costs, its location near the geographical center of the County, easy freeway access, good weather, and a relatively low environmental impact level. In addition, the large amount of leasable

facilities . . . provide a unique opportunity, through the revenue thereby generated, to establish a self-paying aviation facility, without imposing additional taxpayer burdens." The findings of fact further stated that a new airport would be too expensive, costing between 10 and 40 million dollars, which Ventura County could not afford to pay. Airport site selection, it was stated, would be very difficult in terms of public access, weather and air space requirements, if the airport ordinance controlled.

III

The Conclusions of Law

The trial court concluded that the airport ordinance was unconstitutional, in that it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as article I, section 7 and article IV, section 16, of the California Constitution. The ordinance was considered a violation of equal protection because, "in an election to pass on a proposed

county airport action, all county residents, except those residing in the city where the airport is proposed to be located, are denied the right to vote. There is no compelling or rational basis to support the voting classification established by Proposition A."

The ordinance was also determined to be invalid because, by passage of the State Aeronautics Act (Pub. Util. Code, §§ 21001 et seq.) and other legislation, the state legislature has preempted and occupied the field with respect to the location and establishment of county airports, properly delegating that power to county boards of supervisors, including the Ventura County Board of Supervisors, who act as "state agents" in selecting airport sites witin a county. Thus, it was held that state preemption precluded the use of the initiative process to attempt control of the location of local airports.

There were still other conclusions of law: the initiative was deemed defective because the ordinance would divest the Ventura County Board of Supervisors of

the power to enact future legislation concerning airport location, delegating that power unlawfully to city voters in Ventura County; the initiative ordinance also constituted an unlawful interference with the exercise of an important governmental function, i.e., the supervision of county airports.

On this appeal we note that plaintiffs do not attack the sufficiency of the evidence to support the findings. However, we view certain of the findings of fact as not too significant to the issues presented, in light of the non-controversial fact that more airports are needed to provide service to the presumably increasing population of Ventura County. We have not been informed by either side of any significant population trends, buttressed by tangible evidence, which might affect the result here. Thus, we do not know how many voters there are in the unincorporated areas of Ventura County around Camarillo, or, for that matter, how many city voters reside in the path of aircraft takeoffs and landings at the Oxnard Air Force Base. In a sense, therefore, we decide

this matter somewhat in a factual vacuum, because all parties have accepted the premise that the issues are matters of law alone.

We observe at the outset that the confrontation here is a classic one -- one requiring the expenditure of increasing amounts of time in judicial review. The confrontation occurs between what has become the traditional argument in favor of "progress" and growth, and the emerging concept of finiteness, that we must protect the environmental values still existing in our local communities. (See Construction Ind. Ass'n, Sonoma County v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, as an example of the recognition of the right of local communities to prevent uncontrolled growth which would impair local environmental values.) While the trial court's findings, favoring as they do the prevailing defendants, tell us that Ventura County is in need of more airports, they do not include recognition of a reality of which we may take judicial notice: that residents who live in the immediate vicinity of a

busy airport must suffer the parade of undesirable elements involved around airports -- congestion and dirt, certainly, but most important of all, noise -- noise which interferes with the ability of the unfortunate nearby resident to carry on, without annoyance and frustration, the most routine aspects of life. The damage of these citizens, considered after the fact, has long been recognized as actionable in courts of law. (United States v. Causby (1946) 328 U.S. 256; Griggs v. Allegheny County (1962) 369 U.S. 84; Nestle v. City of Santa Monica (1972) 6 Cal.3d 920; Aaron v. City of Los Angeles (1974) 40 Cal.App.3d 471.)

Efforts by embattled citizens to deal with the airport problem at its source have to date proved less than successful. (Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal.2d 582.) The record before us details the efforts made by certain Camarillo residents to attack the primary decision of airport site location in the face of the determination of local government

officials to proceed, regardless of the majority vote against their actions which was recorded in the 1974 election.

IV

Equal Protection of the Laws

Plaintiffs contend that the trial court's decision -- declaring the ordinance in question a violation of the equal-protection-of-the-laws provisions of the federal and state Constitutions -- is erroneous. We conclude, however, that Ventura County Airport Initiative Ordinance No. 1 contains a voting scheme which violates the equal protection clause of both the federal and state Constitutions in that it approves an invidious discrimination against noncity voters in Ventura County.

The concept of equal protection of the laws "has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances . . . ." (Gray v. Whitmore (1971) 17 Cal.App.3d 1, 21.) (Emphasis

added.) In the case at bench, we have an ordinance which confers upon voters within city limits the opportunity to vote on a local environmental issue -- the location of an airport -- while denying that same right to persons living outside of cities although the same airport may constitute a similar invasion of the environment.[2/] The distinctive line drawn is a city boundary, while the local problem stretches across such boundaries in the case at bench.

"[A] court must determine at the threshold of any 'equal protection' analysis the 'level of scrutiny' or 'standard of review' which is appropriate

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2/ Plaintiffs complain that the record tells us little of the intervenors in the trial court, pointing out that no evidence was offered in support of their complaint in intervention. But plaintiffs at trial admitted the key allegation of the complaint in intervention -- that intervenors were residents, registered voters and taxpayers residing outside of the city limits of the City of Camarillo and the Oxnard Air Force Base. Although intervenors did not file a brief on appeal, they adopted by reference respondents' brief, pursuant to Rule 14 (a) of the California Rules of Court.

to the case at hand." (Gould v. Grubb (1975) 14 Cal.3d 661, 669.) With respect to the appropriate level of scrutiny, "the United States Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection clause. 'In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.] [¶] On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' [Citations.]" Serrano v. Priest (1971) 5 Cal.3d 584, 597.) (Emphasis in original.)

In the instant case, plaintiffs contend that the initiative ordinance, legislation by the people, should be adjudged by the less stringent, "rational relationship" standard, and further assert that there is clearly a rational relationship between city voting and airport location, excluding noncity voters, because of the particular problem that density of population causes for city voters.

However, the strict standard of review has long been held to apply to voting legislation which excludes certain potential voters from participation. (Kramer v. Union School District (1969) 395 U.S. 621; Cipriano v. City of Houma (1969) 395 U.S. 701; Curtis v. Board of Supervisors (1972) 7 Cal.3d 942.) There has been a subsequent refinement of this general principle as it applies to analysis of legislative voting classifications: an exclusion of voters invoking strict constitutional scrutiny has been held to mean an "identifiable class" of voters (Weber v. City Council (1973) 9 Cal.3d 950; Gordon v. Lance (1971) 403 U.S. 1) and, "[a]lthough not every

classification created . . . is subject to strict scrutiny, the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process." (Choudhry v. Free (1976) 17 Cal.3d 660, 664; see Bullock v. Carter (1972) 405 U.S. 134, 144.) For a legislative classification relating to the elective process to avoid the strict scrutiny test of equal protection, it must have "only minimal, if any, effect on the fundamental right to vote." (Gould, supra, 14 Cal.3d 661 670.)

Thus we conclude that "strict" judicial scrutiny of the airport ordinance is required by the decisional law. The ordinance excludes an "identifiable class" of voters, namely, noncity voters in Ventura County and, as such, has a direct impact on the electoral process.

The compelling interest expressed in the initiative ordinance is the protection of local environmental values. However, we regard the ordinance as more of an attempt to regulate airport site

selection than to prohibit airports, although the veto power conferred by Section 1 to city voters not only gives them the power to prohibit airports within their borders but the power to "dump" the problem upon the disenfranchised residents of unincorporated areas. The distinction drawn, in our view, was not necessary to further the compelling interest of the state, as expressed by the voters. Hence, the ordinance must fail. Assuming that airports must be located somewhere, environmental concerns over their location cannot be protected by such invidious discrimination.

Some purely local issues such as changes in the form of a local government are to be distinguished in terms of voter classification and equal protection.[3/] But as the United States

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3/ Thus, the California Supreme Court has upheld the use of the initiative to compel protective zoning (San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 205; Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal.3d 225) in the face of due process attack. (See also (continued)

Supreme Court pointed out in Reynolds v. Sims (1964) 377 U.S. 533, 563, 568, in the context of legislative reapportionment, "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." (Emphasis added.)

In a final effort to save the airport ordinance from the abyss of unconstitutionality, plaintiffs rely upon the recent United States Supreme Court decision of Town of Lockport v. Citizens for Community Action (1977) ___ U.S. ___ (reported in 45 U.S. Law Week 4255). Plaintiffs contend that this decision, involving a voting scheme measured in terms of equal protection, is persuasive authority on the issue presented in the case at bench. But nothing in the case supports the contention made.

3/ (continued) East Lake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668, involving a somewhat similar holding by the United States Supreme Court with respect to an Ohio Municipal charter amendment.)

Lockport dealt with a New York statute which provided that a new county charter was permissible only if approved in a referendum election by separate majorities of the voters who live in the cities within the county, and of those who live outside the cities. It was recognized that such a provision could have the effect of nullifying a proposed new charter if the majority of noncity voters disapproved, even though a majority of all voters in a county -- including city and noncity voters -- approved of the new charter. Lockport held that this New York statute was immune from attack under the Equal Protection Clause of the Fourteenth Amendment.

The attack on the New York statute was made on the ground that all voters in a New York county have identical interests in the adoption or rejection of a new charter, and that any distinction, therefore, between voters drawn on the basis of residence and working to the detriment of an identifiable class is an invidious discrimination. The Lockport court conceded that, if it were clear that all voters in a county

had substantially identical interests in the adoption of a new county charter, regardless of where they resided in the county, the New York law would constitute a denial of equal protection of the laws. But the Lockport court held that such a premise was unacceptable -- that the New York law rested on the state's identification of the distinctive interests of the residents of the cities and towns within a county rather than their interests as residents of the county as a homogeneous unit. Lockport concluded that the separate voter approval requirements between city voters and noncity voters of a county was based on a perception that the impact of a restructuring of local government may be felt quite differently by city units of a county and the noncity units of a county in terms of public services. Hence, the New York law was deemed valid in recognizing the realities of the substantially differing electoral interests.

It is readily apparent that the New York law involved in Lockport is quite different from the airport initiative ordinance before us. Lockport did not

deal with a statute which excluded voters based on residence. On the contrary, the statute in Lockport gave equal recognition to the interests of the noncity voters in a new county charter as it did to the interests of the city voters. The rationale of Lockport lends support to the contention that the airport ordinance before us constitutes an invidious discrimination against noncity residents and voters of Ventura County, since such voters are given no standing to object to the location of an airport in their community even though they may be affected just as adversely by an airport as the voters who reside within the cities of Ventura County.

Since the initiative voting scheme of the airport ordinance renders it unconstitutionally defective as to both sections 1 and 2 as a violation of equal protection of the laws, we affirm the judgment of the trial court. Therefore, we find it unnecessary to consider other issues pertaining to the validity of the ordinance -- determined by the trial court and raised by the parties.

Although the airport ordinance contains a severability clause seeking to retain the viability of the balance of the ordinance should certain portions thereof be determined to be invalid or unconstitutional, we hold that section 2 of the ordinance cannot be sustained by itself. Section 2 makes reference to section 1 as being an exception to section 2. Section 2, therefore, is so intertwined with section 1 that if section 1 falls, section 2 must also fall. But, in addition, the provisions of section 2, which preclude the County of Ventura from establishing, maintaining or operating an airport located in unincorporated territory if any portion of any runway is within one and one-half miles of residential property, discriminates invidiously against residents of incorporated cities in favor of residents of unincorporated territory. Under section 2, the County is not precluded from locating an airport in an incorporated city with runways within one and one-half miles of residential property. No rational justification is shown for giving residential-area residents of unincorporated territory protection not afforded to residential-area residents of incorporated cities.

The judgment is affirmed.

Plaintiffs' and appellants' petition for rehearing is denied.

CERTIFIED FOR PUBLICATION

JEFFERSON (Bernard), J.

We concur:

KINGSLEY, Acting P.J.

DUNN, J.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

DEC 15 1977

I have this day filed Order _____

HEARING DENIED

In re: 2 Civ. No. 48220
Hawn

vs.
County of Ventura

Respectfully,

G.E. BISHEL
Clerk

UNITED STATES CONSTITUTION

Amendment XIV, §1

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA CONSTITUTION

Article XI, §7

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

COUNTY AIRPORT INITIATIVE

ORDINANCE NO 1

AN ORDINANCE OF THE PEOPLE OF THE COUNTY OF VENTURA PROHIBITING THE COUNTY OF VENTURA FROM OWNING OR OPERATING CERTAIN KINDS OF AIRPORT PROPERTIES AND REGULATING THE COUNTY IN ITS OWNING AND OPERATING OF CERTAIN OTHER KINDS OF AIRPORT PROPERTIES.

THE PEOPLE OF THE COUNTY OF VENTURA DO ORDAIN AS FOLLOWS:

SECTION 1.

(a) VOTERS SHALL HAVE THE RIGHT TO APPROVE AIRPORTS LOCATED WITHIN CITY LIMITS. Prior to the establishing, owning, operating, leasing or maintaining of any airport by the County of Ventura located in whole or in part within any incorporated city in the County of Ventura, approval by the majority of voters voting at any election on such issue of any such city shall first be obtained.

(b) EFFECT ON EXISTING AIRPORTS. This Section shall not prohibit the County of Ventura from maintaining and operating any airport which was regularly and actively being operated by any governmental entity or agency as an airport on a day to day basis with flight operations as of December 1, 1972; provided, however, such excepted airport shall not have any runways added, nor shall any of the runways of such excepted airport be extended, widened, lengthened, strengthened nor capped unless the question of such

addition, extension, widening, lengthening, strengthening or capping of such runway or runways has been submitted to the voters of the city in which such airport is located and a majority of those voting on such question have voted in favor thereof. Maintenance and repair of existing runways that would not expand the then existing levels of service provided by said runways may be performed without such a vote.

SECTION 2. ZONING RESTRICTIONS AROUND AIRPORTS NOT LOCATED IN CITIES. Except as may be permitted pursuant to the provisions of Section 1 of this ordinance, the County of Ventura shall not establish, own, lease, operate nor maintain any airport located in unincorporated territory, if any portion of any runway of such airport is within one and one-half (1 1/2) miles of any property limited by the applicable zoning ordinance for such property to residential uses.

SECTION 3. DEFINITION OF "AIRPORT" For the purposes of this ordinance, airport shall include any airstrip, landing strip, pad, runway or other facility for the landing or taking off of fixed-wing or other aircraft, including helicopters. This ordinance shall not be applicable to public safety or emergency heliports or public safety or emergency helipads.

SECTION 4. AGENCIES AND ENTITIES AFFECTED. For the purposes of this ordinance, the County of Ventura shall include any agency or entity formed pursuant to a contract to which said County is a party, or any agency or entity of which said county is

a party or a member, or any agency or entity established by said county.

SECTION 5. SEVERABILITY. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The people hereby declare that they have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any section, subsection, sentence, clause, phrase, or portion be declared invalid or unconstitutional.

SECTION 6. EFFECTIVE DATE. This ordinance shall take effect immediately upon its adoption.

Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioners,

v.

COUNTY OF VENTURA, CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioners,

v.

COUNTY OF VENTURA, CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the California Court of Appeal (App. 1-28 of Petition) is reported as Hawn v. County of Ventura (1977) 73 Cal. App.3d 1009 and 74 Cal. App.3d 582a, 141 Cal.Rptr. 111.

Jurisdiction

Petitioners have requested review by this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Was Ventura County Airport Initiative Ordinance No. 1 held to be invalid under provisions of the California Constitution?

2. Is Ventura County Airport Initiative Ordinance No. 1 invalid under the California Constitution, California statutes and California case law?

3. Assuming that Ventura County Airport Initiative Ordinance No. 1 is valid under California's Constitution, statutes and case law (and, therefore, that a federal question could be reached), does the ordinance nonetheless violate the equal protection requirement of the federal Constitution?

4. Are sections 1 and 2 of Ventura County Airport Initiative Ordinance No. 1 severable (and is severability a federal question)?

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions set forth in the Petition (Pet. App. 30-33), the following California constitutional and statutory provisions are involved in this case, and are (with the exception of the prohibitively lengthy State Aeronautics Act) reproduced in full in the Appendix attached hereto:

California Constitution,
Article I, § 7 (previously in Article I, § 21)
California Constitution,
Article IV, § 16 (previously in Article I, § 11)
California Government Code,
§ 26020
California Public Utilities Code
§§ 21001-21694 (State Aeronautics Act)

STATEMENT OF THE CASE

The summary of facts contained in the opinion of the Court of Appeal (Pet. App. 7-12) substantially parallels the trial court's findings of facts and indicates the background against which the legal issues were presented below. As the opinion indicates, this litigation concerns the Oxnard Air Force Base which has been in operation in Ventura County for approximately 40 years, and which has previously been operated as a public airport between periods of federal military use.

The base, which is now being operated by Ventura County as a public airport, straddles the boundary line of the City of Camarillo and is surrounded for some distance on all sides by sparsely populated agricultural lands. In addition to use of the site for aviation purposes, Ventura County has leased buildings on the property to various school districts for use for educational purposes.

The three individual petitioners herein have constantly opposed operation of the Oxnard Air Force Base as a public airport despite its undeniable geographic and environmental suitability to meet the pressing needs for air service in Ventura County and the prohibitive costs of developing any alternate location. (See Pet. App. 10-12) Seeking to employ Ventura County Airport Initiative Ordinance No. 1 as a mechanism for realizing their desire to prohibit airport operations, petitioners initiated this lawsuit to enjoin the County of Ventura from using the airport facility until such time as the use is approved by a majority of the electors residing within the City of Camarillo and to obtain a judicial declaration as to the validity of the ordinance.

The trial court determined that the subject ordinance was invalid because of conflicts with numerous California statutes and judicial decisions (see Pet. App. 13-14) in addition to its unconstitutional denial of equal protection of the laws. The California Court of Appeal affirmed (Pet.

App. 1-28), and petitioners' subsequent request for a hearing in the California Supreme Court was denied. (Pet. App. 29)

Initially, the City of Camarillo was aligned with the three individual petitioners herein as plaintiffs in this action. However, in a city election held while this case was pending before the Court of Appeal, the residents of the City of Camarillo elected a majority of pro-airport candidates to the City Council and the city subsequently abandoned its appeal. (Pet. App. 3, fn. 1)

In their "Statement of the Case" herein, petitioners have asserted that Ventura County's decision to operate the subject airport "was wholly arbitrary" and that "no planning or site selection whatever took place." (Pet. 12, fn. 6) However, the facts, as ascertained by the courts below, show that studies were conducted which confirmed the existence of an unmet need for air service in Ventura County and that operation of the Oxnard Air Force Base represents the

"only present, feasible alternative" to meet existing airport requirements. (Pet. App. 11) Regarding any alleged lack of "planning," petitioners have already conceded in their Opening Brief (p. 5, fn. 5) below that Ventura County "has obtained a state airport permit" for the Oxnard Air Force Base. This permit issued only after public hearings were held to evaluate environmental considerations and the California Department of Transportation was able to determine therefrom that the "advantages to the public" of the airport operation outweighed any "disadvantages to the environment." California Public Utilities Code § 21666(e).

In their attempt to enlist the attention of this Court, petitioners have also made the curious (and unsupportable) assertion in their "Statement of the Case" that the California Court of Appeal "based its decision on federal equal protection grounds alone" (emphasis added) and, thus, that "the federal constitutional issue . . . forms the sole basis of

the decision below." (Pet. 8--emphasis added) Despite petitioners' understandable desire to deny the existence of any independent state ground for the judgment below in order to invoke this Court's review, such representations regarding the basis of the decision below are flatly contradicted in the opinion of the Court of Appeal. After noting in its opinion that the trial court had found the subject ordinance invalid on the grounds, inter alia, "that it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as article I, section 7 and article IV, section 16, of the California Constitution" (Pet. App. 12--emphasis added), the Court of Appeal specifically expressed its concurrence as follows:

> "We conclude . . . that Ventura County Airport Initiative Ordinance No. 1 contains a voting scheme which violates the equal protection clause of both the federal and state Constitutions . . . ." (Pet. App. 17--emphasis added)

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW RESTS ON INDEPENDENT, ADEQUATE STATE CONSTITUTIONAL GROUNDS.

Petitioners are clearly in error in asserting that the decision below rests "on federal equal protection grounds alone" (Pet. 8), for both the trial and appellate courts expressly concluded that the subject airport ordinance violates the equal protection provisions of the California Constitution. (Pet. App. 12 and 17) Such provisions (Cal. Const., Article I, § 7 and Article IV, § 16--previously in Article I, § 21 and Article 1, § 11, respectively) are, as previously recognized by this Court, the California equivalent of the federal equal protection clause. Department of Mental Hygiene of Cal. v. Kirchner (1965) 380 U.S. 194, 196, fn. 1. As noted by the California Supreme Court, the federal equal protection clause and the California equal protection provisions "provide generally equivalent but indepen-

dent protections in their respective jurisdictions." (Emphasis added.) Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 330.

The opinion of the Court of Appeal expressly stated that the subject airport ordinance was found to be unconstitutional under "both" the federal and state constitutions (Pet. 17).[1/] Past cases have made clear that jurisdiction to review would exist "only if the federal ground had been the sole basis for the decision" (emphasis in original) Dept. of Mental Hygiene of Cal. v. Kirchner (1965) 380 U.S. 194, 198, and that in cases where the same conclusion as to unequal protection could be reached under either the federal or state constitution, the

1/ "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. [Citations]" Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487, 491-492.

California equal protection provisions independently compel the state court's decision. Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 330.

Inasmuch as the decision below rests upon an independent, adequate state constitutional ground, it is respectfully submitted that long-settled principles governing review by this Court[2/] call for denial of the petition for certiorari herein.

II

THE DECISION BELOW IS SUPPORTABLE ON NUMEROUS OTHER NON-FEDERAL GROUNDS.

As noted by the Court of Appeal (at Pet. App. 12-14), the trial court

2/ See Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487, Fay v. Noia (1963) 372 U.S. 391, Herb v. Pitcairn (1945) 324 U.S. 117, Enterprise Irrigation Dist. v. Farmers Mutual Canal Co. (1917) 243 U.S. 157.

found the airport initiative[3] ordinance to be invalid not just on constitutional grounds, but also in light of conflicts with California's statutory law and judicial precedents. The decision below is clearly supportable on such other non-federal grounds:

A. The subject airport ordinance constitutes an unlawful exercise of the local initiative power under California law in that it seeks to impose additional airport siting requirements in a field which has been fully occupied by the state general law.

As concluded by the trial court, the California State Legislature has preempted and wholly occupies the law of the state in respect to the location and establishment of county airports through its passage of the State Aeronautics Act (California

3/ For an overview of California law regarding initiative and referendum measures, see Chapter 5 ("California Law on Initiative and Referendum") in THE LAW OF POLITICS (Calif. Cont. Ed. Bar 1977), pp. 321-368.

Public Utilities Code §§ 21001 et seq.)[4] and other measures, and has specifically delegated to each county board of supervisors (as an agent for local implementation of state purposes) the authority to "provide and maintain public airports . . . either within or without the incorporated territory of municipalities." (California Government Code § 26020) Under California law, matters of statewide concern on which particular powers have been exclusively delegated by the State Legislature to the local legisla-

4/ In this Act, the California Legislature has set forth hundreds of provisions regulating all aspects of aeronautics (including airport site selection, approval for which must be obtained from the California Department of Transportation--§ 21662) for the purposes, inter alia, of promoting the development of a "statewide system of airports" and "effecting uniformity of the laws and regulations relating to aeronautics." § 21002. Significantly, the Act provides that it is the state which has the responsibility of determining the environmental suitability of proposed airport sites (§ 21666(e))--a responsibility which the subject local ordinance proposes to transfer to the voters of the City of Camarillo.

tive body cannot be subjected to local initiative and referendum measures.5/

B. The subject airport ordinance is invalid under California law in that it substantially impairs and interferes with the county's discharge of its governmental function of meeting the aviation needs of its citizens.

Under California law, the operation of a public airport is recognized to be a "public and governmental function . . . exercised for a public purpose" as a matter of "public necessity." California Public Utilities Code § 21004. Interference with the discharge of this important governmental function by local initiative and referendum measures is not permitted.

5/ 5 Witkin, SUMMARY OF CAL. LAW (8th ed. 1974) Constitutional Law, § 87, p. 3322; THE LAW OF POLITICS (Calif. Cont. Ed. Bar 1977), §§ 5.8, 5.10 and 5.16. Also see Whitney v. Municipal Court (1962) 58 Cal.2d 907, 909, 27 Cal.Rptr. 16, 17-18, Mueller v. Brown (1963) 221 Cal.App.2d 319, 327, 34 Cal.Rptr. 474, 478, Mitchell v. Walker (1956) 140 Cal.App. 2d 239, 244, 295 P.2d 90, 93, California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, 61 Cal.Rptr. 618, Mervynne v. Acker (1961) 189 Cal.App.2d 558, 11 Cal.Rptr. 340.

See Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 839-840, 313 P.2d 545, 549, Hunt v. Mayor & Council of Riverside (1948) 31 Cal.2d 618, 628-629, 191 P.2d 426, 431-432, Chase v. Kalber (1915) 28 Cal.App. 561, 569-570, 153 P. 397, 400.

C. The subject airport ordinance is invalid under California law in that it delegates to cities a portion of the county's discretion to determine land uses in unincorporated areas.

Section 1 of the subject airport ordinance unquestionably prohibits the County of Ventura from establishing airports within incorporated areas absent a prior favorable vote of city electors and, thus, has the effect of delegating to city electors powers of decision which have been assigned specifically to the county board of supervisors by the State Legislature in California Government Code § 26020. Section 2 of the ordinance contains a more subtle, but equally effective, delegation of the county board's powers to the cities in its prohibition of the establishment of county airports

even in unincorporated territory "if any portion of any runway of such airport is within one and one-half (1 1/2) miles of any property limited by the applicable zoning ordinance for such property to residential uses." (Pet. App. 32--emphasis added)

The zoning which is "applicable" within city boundaries is, of course, city zoning. The county board of supervisors has no ability to zone city lands and the city has no power to zone county lands under California Constitution, Article XI, § 7.[6/] (Pet. App. 30) Yet, by virtue of section 2, the subject airport ordinance allows cities to impose a "nonairport" zone extending at least one and one-half miles into unincorporated territory merely by zoning property at the edges of their municipal boundaries as "residential." In effect,

6/ In addition to the lack of constitutional authority for California cities to zone outside their boundaries, "there is no statutory power to zone extraterritorially." CALIFORNIA ZONING PRACTICE (Calif. Cont. Ed. Bar 1969), § 4.33, p. 124.

therefore, the ordinance delegates to cities a portion of the county's power to zone county territory, allowing cities to zone extraterritorially in contravention of the California Constitution.

As evidenced by this brief review, the subject airport ordinance is demonstrably invalid on numerous nonfederal grounds. In light of its recognition of the ordinance's equal protection infirmities under both the federal and state Constitutions, the Court of Appeal found it unnecessary to consider these other nonfederal issues. (Pet. App. 26) However, the presence of such other meritorious arguments shows that the decision below was correct without regard for the alleged federal question sought to be raised by the petition herein. As a result, no federal question need even be reached in order to sustain the decision below.

III

THE DECISION BELOW REGARDING THE UNCONSTITUTIONALITY OF THE AIRPORT ORDINANCE UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS WAS CLEARLY CORRECT.

A. Section 1 of the ordinance denies equal protection of the laws.

For equal protection purposes, under both the California and federal Constitutions, the voting scheme established by Ventura County Airport Intiative Ordinance No. 1 is clearly invalid. This conclusion holds true whether the ordinance is evaluated under either the liberal "rational relationship" test or the strict "compelling interest" test which is normally applied by both state and federal courts to classifications involving voting rights.7/

7/ See Kramer v. Union Free School District (1969) 395 U.S. 621, 627-628, Weber v. City Council (1973) 9 Cal. 3d 950, 960, 109 Cal.Rptr. 553, 559, Curtis v. Board of Supervisors (1972) 7 Cal.3d 942, 951-952, 104 Cal.Rptr. 297, 303-304, County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, 871, 99 Cal.Rtpr. 710, 715.

Regarding section 1's denial of equal protection, it should be noted that the subject airport ordinance is apparently designed to deal only with the impacts of aircraft landing and taking off over nearby residences.8/ Yet, rather than purporting to require a vote of all those residing within a given distance of a proposed runway location, section 1 distributes the franchise in such matters only to those who happen to reside within invisible municipal boundaries. How, if the impact of overflights is the problem sought to be solved by enfranchisement of those affected, can it ever be "rational" (much less "compelling") to poll only those who happen to reside

8/ Note, for example, that the ordinance defines "airport" so as to require an election only upon the location of runways within specified distances and not upon the location of passenger terminals, parking lots, hangars and other accessory facilities. (Pet. App. 32)

within corporate limits?[9/]

Even assuming, arguendo, that it is proper to enact a proposal authorizing balloting on airport locations only by those citizens "primarily affected" by aircraft overflights, it is clear that section 1's scheme does not satisfy the "exacting standard of precision" required of "statutes which selectively distribute the franchise." Kramer v. Union Free School District (1969) 395 U.S. 621, 632. As noted in the Kramer case,

> "Whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." (Emphasis added.) Id.

9/ As the California Supreme Court has recognized, "municipal boundary lines rarely indicate where urban development ceases" and care should be taken not to "make a fetish out of invisible municipal boundary lines." Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 548, 99 Cal.Rptr. 745, 749.

By purporting to enfranchise all those who live within the City of Camarillo, regardless of how far away from the Oxnard Air Force Base they may actually reside, while denying the vote to all residents of unincorporated areas, regardless of how near the Oxnard Air Force Base they may reside, [10/] section 1 presents a classic example of the sort of irrational and imprecise distribution of the franchise condemned in Kramer. To wit, its classifications "permit inclusion of many persons who have, at best, a remote and indirect interest . . . [in the subject of the election] and, on the other hand, exclude others who have a distinct and direct interest . . . [in such subject]." Id.

Obviously, if the purpose of section 1 is to enfranchise those persons who are

10/ In this regard, it should be noted that private intervenors/respondents Johnson and Richardson reside outside of the City of Camarillo, but "in the immediate vicinity of the City of Camarillo and the Oxnard Air Force Base" (emphasis added, 74 Cal.App.3d at 1018, fn. 2, 141 Cal.Rptr. at 116, fn. 2)--a point omitted from petitioners' reproduction of the text of the decision below (see Pet. App. 18, fn. 2).

directly affected by the arrival and departure of aircraft (as would appear to be the case judging from the ordinance's definition of "airport"), city boundaries provide no rational line of demarcation. Nor is there any other logical justification for the voting distinctions drawn by section 1. To assert that this section does not violate both state and federal requirements of equal protection by including only city residents and excluding all county residents regardless of their proximity to the airport is to ignore the fact that neither the benefits nor the burdens of airport operations fall exclusively on city residents. As legislatively declared in California, there is a statewide "public interest" in the benefits derived from air transportation. California Public Utilities Code § 21002. And the burdens of airport operation, both environmental and monetary (California Government Code § 26020(c) and (e)), fall both within and outside of incorporated areas. Such benefits and burdens recognize no city boundaries.11/

11/ Nor can the equal protection infirmities of section 1's voting scheme be ex-

B. Section 2 of the ordinance cannot stand independently of Section 1.

Having correctly determined that section 1 of the subject airport ordinance violates the equal protection clauses of both the federal Constitution and the California Constitution (Article I, § 7 and Article IV, § 16), the Court of Appeal went on to hold that

> "section 2 of the ordinance cannot be sustained by itself. Section 2 makes reference to section 1 as being an exception to section 2. Section 2, therefore, is so intertwined with section 1 that if

11/ (continued)
cused by the fact that the subject ordinance was adopted as an initiative measure. Whether viewed under federal or state precedents, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty-Fourth Gen. Assem. of Colo. (1964) 377 U.S. 713, 736-737. Also see Westbrook v. Mihaly (1970) 2 Cal.3d 765, 796, 87 Cal.Rptr. 839, 861, vacated on other grounds (1971) 403 U.S. 915.

section 1 falls, section 2 must also fall." (Pet. App. 27)12/

Petitioners have argued at length that this holding is incorrect, pointing out that the ordinance contains a broad severability clause. (Pet. 28-30) However, completely aside from the fact that severability issues do not constitute

12/ In addition to holding that section 2 cannot stand in the absence of section 1 to which it refers as an exception, the Court of Appeal also commented on the impropriety of giving section 2 partial effect so as to flatly prohibit airports on unincorporated lands near residential zones but not on incorporated lands near residential zones. (Pet. App. 27) The petitioners herein criticize this additional basis for the court's ruling at length on the apparent assumption that section 2 is a county land use ordinance and that the county cannot zone city lands. However, the Court of Appeal did not say that it was treating section 2 as a county zoning ordinance; it merely recognized that, in the exercise of its statutory power to locate airports "either within or without the incorporated territory of muncipalities" (California Government Code § 26020(a)), the county may not preferentially protect residentially zoned areas near unincorporated airport sites to the detriment of residentially zoned areas near incorporated airport sites without some rational justifi-

federal questions,13/ such arguments ignore settled California principles regarding application of severability clauses. Under California law, a severability clause is not to be treated as an "inexorable command" to sever (Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal.Rptr. 95, 100) and "does not deprive the judiciary of its normal power and duty to construe the statute and determine whether the unconstitional part so materially affects the balance as to render the entire enactment void." California Emp. Etc. Com. v. Payne (1947) 31 Cal.2d 210, 214, 187 P.2d 702, 704.

12/ (continued)
cation for making a distinction between such incorporated and unincorporated residential areas. Moreover, petitioners' dissatisfaction with the appellate court's discussion of this secondary basis for invalidating section 2 does not change the validity of the Court's primary and independent holding that section 2 is too intermeshed with section 1 to stand alone.

13/ See Fox Film Corp. v. Muller (1935) 296 U.S. 207, 210.

To enforce section 2 while ignoring its reference to the voting exception of section 1 would have the effect, inter alia, of automatically prohibiting airport operations on unincorporated lands nearby, and on unincorporated islands within, cities if there is any residentially zoned city land within a one and one-half mile radius of the airport[14/] without regard to whether the city residents might wish to have such airport facilities. Obviously, the thought that its reference to the section 1 exception would

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14/ It should be noted that section 2 does not speak simply of banning airports on unincorporated sites within one and one-half miles of "county residential areas" as petitioners assert (Pet. 3 (fn. 2), 15 and 25), but within one and one-half miles of "any property limited by the applicable zoning ordinance for such property to residential uses." (Pet. App. 32--emphasis added) Thus, section 2 is applicable to unincorporated airport sites within one and one-half miles of any land which the "applicable" zoning ordinance (be it city or county) has limited to residential uses, and would prohibit airport operations on county lands both outside of and within city limits (i.e., on unincorporated islands) if there is any land within a one and one-half mile radius of the airport which has been zoned residential.

have allowed city voters to authorize such an airport may well have been a major inducement to the voters' approval of section 2. To speculate in such a situation that the voters might have enacted section 2 even without its reference to the saving provisions of section 1 would be to assume that which cannot be known, and would fly in the face of settled principles of state law regarding the application of severability clauses:

> "[T]he general rule is that only the invalid portion of a legislative enactment should be stricken down, and the valid balance enforced . . . . Of course, where this procedure would amount to usurpation of the legislative power, as where the exception may well have been a major inducement to adoption of the legislation, the entire act must fall [citation]." (Emphasis added.) Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal. Rptr. 95, 100. (Also see O'Kane v. Catuira (1963) 212 Cal.App.2d 131, 141, 27 Cal.Rptr. 818, 824.)

By its specific reference to the voting provisions of section 1 as an exception to its own prohibitions,

section 2 becomes inextricably intertwined with section 1 and must fall with it.[15/]

IV

THE DECISION BELOW IS OF LIMITED AND LOCAL EFFECT AND IS WITHOUT NATIONAL SIGNIFICANCE.

This case involves the validity of but a single, unique county ordinance under one state's particular constitutional provisions, statutes and judicial precedents. No issues of national interest or significance are presented; in fact, petitioners have been completely unable to suggest any impacts of national importance warranting consumption of this Court's time by review on certiorari.

15/ The fact that the airport ordinance was enacted as an initiative measure does not cause any suspension of the rules governing the application of severability clauses under California law. See Campen v. Greiner (1971) 15 Cal.App.3d 836, 843-844, 93 Cal.Rptr. 525, 529, Mitchell v. Walker (1956) 140 Cal.App.2d 239, 244, 295 P.2d 90, 93, Alexander v. Mitchell (1953) 119 Cal.App.2d 816, 829-830, 260 P.2d 261, 268-269.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CALIFORNIA CONSTITUTION

Article I, § 7

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

CALIFORNIA CONSTITUTION

Article IV, § 16

"(a) All laws of a general nature have uniform operation.

(b) A local or special statute is invalid in any case if a general statute can be made applicable."

CALIFORNIA GOVERNMENT CODE

§ 26020

"As a necessary adjunct to aerial transportation and the use of aerial high-

ways, the board of supervisors may provide and maintain public airports and landing places for aerial traffic for the use of the public. For such purposes the board of supervisors may:

(a) Acquire by purchase, condemnation, donation, lease, or otherwise real or personal property, either within or without the incorporated territory of municipalities, necessary for such purposes, and improve, construct, reconstruct, lease, furnish, refurnish, use, repair, maintain, and control the property, including buildings, structures, and lighting and other equipment and facilities necessary for such use.

(b) Provide all necessary custodians, employees, attendants, and supplies for the proper maintenance of the property for the purposes specified in this section.

(c) In addition to all other taxes, levy in any year a special tax not to exceed three mills ($0.003) on the one dollar ($1) of assessed valuation on all taxable property in the county, the proceeds of which may be accumulated for not to exceed five years for use in carrying out the purposes of this section. A county board of supervisors shall not levy an airport tax as provided for by this section on any airport district formed pursuant to the 'California Airport District Act' (Part 2 (commencing with Section 22001) of Division 9 of the Public Utilities Code).

(d) Establish a fund or funds for such purposes and appropriate and transfer from the general fund to such fund or funds from time to time such money as it deems necessary.

(e) In the manner provided by law, incur a bonded indebtedness on behalf of the county."

Supreme Court, U. S.
FILED
MAY 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioner,

vs.

COUNTY OF VENTURA,
CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

(IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI)

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I.
RESPONDENTS' SUGGESTION THAT THE DECISION BELOW STRIPPING COUNTIES OF THEIR LAND REGULATORY POWERS IS UNIMPORTANT, CANNOT BE SERIOUSLY ADVANCED.

In what is probably the most telling infirmity of respondents' position, they try to gloss over the fact that by the

decision below the half million inhabitants of an entire populous county were stripped of their constitutional right to control land uses (East Lake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668), by a clearly wrong interpretation of the Constitution. Moreover, respondents ignore the stare decises effects of this decision which, if permitted to harden into precedent, will surely wreak similar havoc on all other California counties.

The opinion below holds (Opinion, Pet. Cert., p. A-27) that the Constitution prevents a county from banning noxious land uses in its own residential areas unless the county performs the legal and political impossibility of simultaneously banning like land uses in incorporated city areas over which the county lacks jurisdiction!

If a county wants to ban airports in its residential areas, what is it supposed to do? A fortiori what is to be done in, say, Los Angeles County which contains over 30 incorporated cities within its boundaries? If that is not a

matter of grave widespread importance, one is at a loss to say what would qualify.[1/]

When the Court below invalidated Section 2 on the grounds it did, it transformed the Equal Protection Clause into a classic "Catch-22": The Constitution forbids a county from regulating its own noxious land uses unless it does the same for cities, but the catch is that the county cannot regulate cities' land at all. If that is what the Constitution says, that is important -- to every county in the Nation, and then some.[2/]

1/ Using respondents' logic one would say that Belle Terre v. Boraas was a trifling matter involving six students' housing problems, New Orleans v. Dukes involved a lone pushcart peddler, East Lake was a local hassle over how to develop one parcel of land in a small town in Ohio, and Marbury v. Madison was no more than a petty squabble over political spoils, between outgoing and incoming administrations.

2/ The "logic" involved here would also compel the conclusion that, say, Maryland may not adopt a superior land title recordation statute to protect its landowners from fraudulent land

(continued)

II.

THERE ARE NO INDEPENDENT STATE GROUNDS SUPPORTING THE DECISION OF THE COURT OF APPEAL.

The problem with respondents' argument is that they seem to be rearguing this case as they presented it to the trial court, rather than the case decided by the Court of Appeal.

Petitioners suggest that for respondents to find themselves driven to a search of the opinion below for nonexistent statutory "independent state grounds" is tantamount to a concession of the indefensible nature of the federal constitutional law propositions which they espouse. The Court of Appeal could not have been clearer; having found the pertinent portions of the Ordinance unconstitutional as denying equal protection of the laws, the court below said:

2/ (continued)

transactions, because that would deny equal protection to landowners in the District of Columbia which is not subject to Maryland's legislative authority.

". . . we find it unnecessary to consider other issues pertaining to the validity of the ordinance -- determined by the trial court and raised by the parties" (Pet. Cert. at p. A-26).

Thus, nonconstitutional matters ineluctably were not considered below.

As for the balance of respondents' arguments on this point, simple perusal of the opinion belies them. The sole authority relied on by the Court below for its substantive constitutional holding (as to Section 1 of the Ordinance) was federal constitutional law -- specifically Reynolds v. Sims (1964) 377 U.S. 533 (see Opinion, Pet. Cert. at p. A-23), and -- incredibly -- Town of Lockport v. Citizens for Community Action (1977) ___U.S.___, 51 L.Ed.2d 313, 97 S.Ct. 1047.3/

3/ The reference by the court below to state constitutional case law had to do with applicability of the "strict scrutiny" vs. "rationality" standards of review. (See Opinion, Pet. Cert., pp. A-17 - A-22).

Respondents' argument is refuted by the very authority they rely on: Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487. In Jankovich the Indiana Supreme Court had explicitly construed that state's eminent domain constitutional provisions as well as state statutory property rights possessed by a landowner in the airspace above his land. See Indiana Toll Road Commission v. Jankovich (1963) 193 N.E.2d 237, 239 [244 Ind. 574]. Thus, in Jankovich, unlike the case at bench, there was express state court reliance on state law.[4/] In the case at bench, on the other hand, the substantive analysis is wholly based on federal constitutional law.

4/ The Indiana Supreme Court first analyzed the issue before it in terms of state law, and having reached its conclusion thereon, added that "The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath" (Ibid., emphasis added), and went on to buttress its decision by a discussion of federal law as well as the law of other states.

Accordingly, petitioners refrain from debating here the various nonconstitutional matters expounded at such length by respondents, matters which were never so much as mentioned, much less decided, by the Court of Appeal. Respondents are in error as a matter of state law as well, and very likely the court below sought to justify its result on constitutional grounds because other suggested bases were even shakier.[5/] Suffice it to say that respondents omit any mention of California law (California Government Code §60485 et seq.) which makes regulation of land use near county airports a local -- not state -- matter, and which

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5/ It is familiar law, followed in California as elsewhere, that constitutional issues are decided last, after other issues prove to be nondispositive of the controversy (for an extensive collection of California case law reiterating this rule, see 13 Cal.Jur.3d, Constitutional Law, §57, pp. 106-107). Thus, the fact that the Court of Appeal discussed only the constitutional issue eloquently bespeaks that court's evident conclusion that respondents' nonconstitutional arguments in defense of the trial court's judgment were erroneous and were thus nondispositive of this controversy.

confers on counties the power to zone near county airports.

III.

RESPONDENTS' "INDEPENDENT STATE GROUNDS" ARGUMENT REDUCES THE NOBLE CONCEPT OF FEDERALISM TO A SEMANTIC GAME.

As already noted, respondents' "independent state grounds" argument flies in the face of the clear language of the opinion of the Court of Appeal. However, it should also be emphasized that respondents have gone beyond that, and managed to reduce the doctrine on which they thus purport to rely to a semantic game.

It is one thing for a state court to interpret its own Constitution and to elucidate a policy justifying its own treatment of the local organic law, after noting its distinct interpretational powers in the exercise of its perception of sound federalsim (see e.g., People v. Disbrow (1976) 16 Cal.3d 101, 114-115, and compare dissent of Richardson, J.,

16 Cal.3d at 118-121 [127 Cal.Rtpr. 360, 545 P.2d 272]).

It is something altogether different to say -- as do respondents -- that merely because an opinion mentions in passing that a law is unconstitutional on both state and federal grounds (Resp. Br., p. 8), that somehow insulates state courts from further review by this Court, even though the substantive constitutional analysis of the decision below rests entirely on federal constitutional law contained in case authorities decided by this Court. The upshot is an Alice-in-Wonderland rule whereby a state court gets to interpret and apply this Court's opinions, while simultaneously rendering this Court impotent to do anything about manifest misapplications of those decisions!

IV.

RESPONDENTS' SEVERABILITY ARGUMENT MISREPRESENTS CALIFORNIA LAW WHICH IN FACT IS THE SAME AS THAT FOLLOWED BY THIS COURT.

Respondents' argument concerning severability (Resp. Br., pp. 23-27) is disingenuous; it ignores the most recent and most authoritative decision in which the California Supreme Court expressly endorsed the same standards of severability as those followed by this Court; see Santa Barbara School Dist. v. Superior Court (1975) 13 Cal.3d 315, 330 [118 Cal.Rptr. 637, 530 P.2d 605]:

> ". . . 'in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. . . .". (Emphasis by the court.)

Whether viewed under the above standards, or under this Court's substantially same ones (see authorities collected at Pet. Cert., pp. 28-30), the holding below on severability seriously disrupts the fabric of prevailing constitutional law.

V.

RESPONDENTS' NOTIONS OF CONSTITUTIONALITY OF SECTION I OF THE ORDINANCE WERE EXPRESSLY REJECTED BY THIS COURT 50 YEARS AGO, AND ARE INCONSISTENT WITH SETTLED CONSTITUTIONAL DOCTRINE.

Respondents argue that a land use regulation involving referendum or initiative is constitutionally wanting unless the franchise is distributed with "precision" to those "primarily affected". If accepted, this ingenious argument would, of course require the overruling of East Lake v. Forest City Enterprises (1976) 426 U.S. 668. There, a constitutional challenge was mounted to a land use ordinance adopted by the entire city's electors, changing zoning of one

particular parcel of land. Manifestly, only a relative handful of the East Lake populace was "primarily affected" by the apartment proposed to be built on the single subject parcel. Yet a city-wide referendum was held proper. Indeed, the sort of conceptual mini-district "precise" limitation of the franchise to those in the immediate vicinity of the controversial land use, was rejected by this Court in Washington ex rel Seattle Trust Co. v. Roberge (1928) 278 U.S. 116. Similarly, respondents' argument would undermine James v. Valtierra (1971) 402 U.S. 137, where constitutionality of a scheme providing for referendum by the voters of the City of San Mateo was upheld, even though the public housing project there in issue could not possibly affect more than a small fraction of them.

As this Court explained in James, supra, giving all the people in a community a voice in decisions that will affect the future development of that community does not deny equal protection (402 U.S. at 143). On the contrary, that is the democratic process in action.

CONCLUSION

While in the preceding pages petitioners refute arguments made by respondents, one should also emphasize one argument conspicuous by its absence. Petitioners urge again that there is simply no one before the Court with standing even to raise the grave constitutional issues so cavalierly dealt with by the court below (see Pet. Hrg., pp. 21-22). That deficient aspect of this case remains unchallenged and indefensible.

Intervention by this Court is urgently needed to review on the merits the patently erroneous and mischief-laden opinion below.

Respectfully submitted,

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